



Terry Tamminen
Agency Secretary

Air Resources Board

Alan C. Lloyd, Ph.D.
Chairman
1001 I Street • P.O. Box 2815
Sacramento, California 95812 • www.arb.ca.gov



Arnold Schwarzenegger
Governor

AIR RESOURCES BOARD
ENFORCEMENT DIVISION

2004 AUG 13 PM 3:13

RECEIVED

MEMORANDUM

TO: Terry Dutton, Senior Deputy County Counsel
San Diego for Air Pollution Control District
9150 Chesapeake Drive
San Diego, CA 92123-1096

THROUGH: Diane Moritz Johnston, General Counsel *DMJ*

FROM: Leslie M. Krinsk, Senior Staff Counsel

DATE: August 10, 2004

SUBJECT: VARIANCES FROM AIR TOXICS CONTROL MEASURES

You have asked whether the hearing board of an air pollution control district (District) may grant a variance from an air toxic control measure (ATCM) that has been adopted or implemented by the ARB in accordance with Health and Safety Code¹ section 39658. We conclude that it may, as long as the findings in section 42352 are made and all the other provisions of the variance statutes are complied with. Our reasoning follows.

Chapter 3.5, "Toxic Air Contaminants," was added to the Health and Safety Code by Stats. 1983, Ch. 1047, sec. 1 to set forth a coordinated state and local approach for evaluating and controlling hazardous pollutants that are not amenable to control by ambient air quality standards. The ARB informally considered the question of variances after the law was amended to provide a more detailed process for adopting and/or implementing ATCMs in coordination with the U.S. Environmental Protection Agency's promulgation of NESHAPS/MACT² standards for hazardous air pollutants (HAPs) in accordance with section 112 of the federal Clean Air Act (see Stats. 1992, Ch. 1161). Prior to the 1992 amendments, the ARB was to adopt its own ATCMs and the Districts were directed to adopt and enforce measures that were equivalent to or more stringent than the ATCM within 6 months of proposing such measures.

¹ All references are to the Health and Safety Code unless otherwise noted.

² NESHAPS – National Emission Standards for Hazardous Air Pollutants. MACT – Maximum Available Control Technology. The first term was used prior to the Clean Air Act Amendments of 1990, which introduced a new, more robust federal program for controlling emissions of hazardous air pollutants (HAPs) centered around the adoption of emission standards, or MACTS, for those HAPs listed by Congress in section 112 of the Clean Air Act.

The energy challenge facing California is real. Every Californian needs to take immediate action to reduce energy consumption. For a list of simple ways you can reduce demand and cut your energy costs, see our Website: <http://www.arb.ca.gov>.

Specifically, upon identifying a toxic air contaminant (TAC) in accordance with sections 39660 through 39662, the ARB was to "prepare a report on the need and appropriate degree of regulation" for the TAC (section 39665) and then "adopt airborne toxic control measures to reduce emissions of [TACs] from nonvehicular sources" after a noticed public hearing. (Section 39666(a)). Thereafter,

[n]ot later than 120 days after the adoption by the state board of an [ATCM] pursuant to this section, the districts shall propose regulations enacting control measures on nonvehicular sources ... which meet the requirements of subdivisions (b), (c), and (e), except that a district may ... adopt and enforce equally effective or more stringent control measures than the [ATCMs] adopted by the state board. A district shall adopt rules and regulations implementing [ATCMs] ... not later than six months following the adoptions of [ATCMs] by the state board. (Emphasis added).

When the law was amended to allow the ARB to simply implement the EPA's MACT for a TAC/HAP if the federal emission standard was suitable for California circumstances (see section 39658(b)), section 39666 was also amended to allow the Districts to "implement and enforce" the ARB's ATCM requirements. Thus, section 39666(d) currently states that

[n]ot later than 120 days after the adoption or implementation by the state board of an [ATCM] pursuant to this section or Section 39658 [which specifies options available to the ARB for establishing ATCMs], the districts shall implement and enforce the [ATCM] or shall propose regulations enacting [ATCMs] on nonvehicular sources ... except that a district may ... adopt and enforce equally effective or more stringent [ATCMs] than [the ARB ATCMs]. A district shall adopt rules and regulations implementing [ATCMs] ... not later than six months following [their adoption by the ARB]. (Emphasis added).

District practice under the amended statutory requirements has varied: some Districts adopt their own "equally effective or more stringent" ATCMs; some incorporate the ARB's ATCM by reference into their rules and regulations; and others simply "implement and enforce" the ARB's ATCM without amending their own rules. The statute cited above allows any of these options.

We had previously determined that District hearing boards could grant variances from ATCMs that had been adopted--either by reference to the ATCM or as a new District rule--into their own rules and regulations, and that the ARB would respect the

temporary enforcement relief that variance would endow to the source as provided in sections 42350 et seq. The Districts have the primary responsibility for the control of air pollution from all sources, other than emissions from vehicles. The Legislature clearly provided variance relief from section 41701 (visible emissions) and District rules and regulations to deserving sources in section 42356, with exceptions not relevant here. Relief from District rules and regulations included variances from District rules pertaining to TACs. Since the variance process authorizes limited enforcement relief as well as ARB oversight of the variance process, we concluded that although the ARB can overfile against a source for violating an ATCM, if a valid variance has been granted from a District-adopted ATCM, the ARB would be constrained from enforcing the ATCM directly against the source.

Thus, even though a District hearing board is not authorized to grant a variance from state law or ARB rules and regulations (except section 41701), we opined that in the interest of carrying out legislative intent, the variance would shield the source from both District and ARB enforcement. In that way somewhat disparate provisions of state law would be harmonized and a consistent state interest in providing relief under carefully circumscribed circumstances would be promoted. (Note that the variance would not provide relief from federal enforcement unless it were incorporated into the State Implementation Plan (SIP), pursuant to longstanding EPA policy). If the ARB found the variance to be improper, it could modify or rescind it in accordance with sections 42362 and 42363.

Under current law, as explained above, the Districts may simply "implement and enforce" the ARB-adopted ATCM or the EPA MACT if the ARB has decided to implement it as the state ATCM under section 39658(b)(1) without adopting it into their own rules (although they still may formally adopt the ATCM or its equivalent). Hence, the variance provision becomes more problematic: the hearing board may not issue a variance from the ARB's ATCM and there is no process in state law for the ARB to grant a variance from its ATCMs upon request by a District. (We believe the ARB could draft a variance provision into its ATCMs, but we have not done so). It would not make sense to permit Districts that have adopted an ATCM into their rules and regulations to grant a variance from its provisions when appropriate but not to allow Districts that are implementing and enforcing the exact same ATCM to do the same. Sufficient safeguards have been supplied by the Legislature in the form of findings, alternative permit terms during the term of the variance, mitigation measures, and ARB review and oversight to ensure that variances from ATCMs will serve the same purpose as variances from other provisions of District rules. (See sections 42350 et seq., especially sections 42352, 42353, 42354, 42360, 42362, and 42363). These same safeguards would be in place for variances from ATCMs that a District is implementing and enforcing, but not adopting.

Terry Dutton
August 10, 2004
Page 4

The ARB, therefore, concludes that as long as the variance procedures in the Health and Safety Code are followed by the hearing board, a District may grant variances from ATCMs that it is implementing and enforcing in accordance with section 39665(d), even if it has not formally adopted them. Please note that this conclusion is limited to ATCMs that the District is implementing and enforcing, and does not apply to any other provisions of state law or ARB regulations. We believe that the exception is warranted in the context of the unique statutory scheme for implementing the state's air toxics provisions, and carries out the intent of the Legislature to provide consistent relief under appropriate circumstances as specified in the variance provisions of the Health and Safety Code.

While the statutes pertaining to this issue are not unambiguous, our interpretation maximizes consistency among the Districts as they implement the statewide program to control TACs and harmonizes the air toxics control program with the Legislature's intent to grant variance relief when warranted. The ARB is exercising its general authority set forth in section 39600 to execute its duty to coordinate the activities of the Districts as they affect air quality and to interpret, harmonize, and make specific the legislative intent expressed in the statutes cited above.

Please contact Diane Moritz Johnston at (916) 323-9606 or Leslie M. Krinsk at (805) 473-7325 if you would like to discuss this matter further.